

P.E.R.C. NO. 2023-50

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PROSPECT PARK BOARD  
OF EDUCATION,

Respondent,

-and-

Docket No. CO-2023-099

TEACHERS ASSOCIATION  
OF PROSPECT PARK,

Charging Party.

SYNOPSIS

The Commission denies, in part, and grants, in part, the Teachers Association of Prospect Park's motion for reconsideration of a Designee's partial grant of interim relief on the Association's unfair practice charge alleging the Board of Education violated the Act when it placed the Association's grievance committee chairperson on paid administrative suspension and barred her from school premises pending an investigation into alleged misconduct in her role as a teacher; and subsequently barred her from participating in a virtual grievance meeting. The Commission declines to reconsider the Designee's denial of the Association's demand that the teacher have access to school grounds to conduct union business while the investigation is pending, as material facts are disputed regarding whether the incident under investigation involved students or implicated their safety and well-being. The Commission, without altering the relief granted, reconsiders the Designee's finding that the Association failed to establish irreparable harm while ordering that the teacher be allowed to conduct union business remotely. The Commission finds the Association established irreparable harm by the teacher's undisputed certification that she alone on the grievance committee has the requisite background and experience to process grievances, which have been stalled in her absence.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Charging Party, Oxfeld Cohen, P.C., attorneys  
(Randi Doner April, of counsel)

For the Respondent, Buglione, Hutton & DeYoe, LLC,  
attorneys (Albert C. Buglione, of counsel)

DECISION

On March 7, 2023, the Teachers Association of Prospect Park (Association) moved for reconsideration of a Commission Designee's decision, I.R. No. 2023-10, which denied in part and granted in part the Association's interim relief application in connection with its unfair practice charge against the Prospect Park Board of Education (Board). The charge, filed December 2, 2022, alleged the Board violated the Act when, in October 2022, it placed Association Co-President and long-time grievance chairperson, B.S., on paid administrative suspension and barred her from school premises during an investigation into alleged

misconduct in her role as a teacher; and subsequently barred her from participating in a virtual grievance meeting.

In its interim relief application, filed on January 4, 2023, and supported by a brief, exhibits and the certification of B.S., the Association sought an order directing that B.S. be given immediate access to district property in order to conduct Association business and restraining the Board from: interfering with the Association's chosen representative (B.S.) in the performance of her Association duties; prohibiting B.S. from entering school property for the purpose of conducting Association business; and refusing to engage with B.S. as the Association's representative on matters concerning the Association and the Board.

On January 9, 2022, the Designee issued an Order to Show Cause Without Temporary Restraints, setting a briefing schedule and a return date for oral argument. In opposition to the Association's interim relief application, the Board submitted a brief, exhibits and the certification of its counsel, Albert C. Buglione. Oral argument occurred on February 9, 2023. The Designee issued a written decision and order on February 27, denying interim relief on the Association's demand that B.S. have access to school grounds, while granting relief to allow her to conduct union business remotely and restraining the Board from refusing her the opportunity to do so. (I.R. at 22.)

The Designee found that "critical questions of law and fact" precluded interim relief with respect to B.S.'s ability to enter school grounds pending the Board's investigation. I.R. at 16. In reaching that conclusion the Designee found, among other things: B.S.'s status as a union officer did not insulate her from investigation; there was no evidence that the Board treated B.S. differently than other employees under investigation for similar misconduct; and the investigation was not pretextual, as B.S.'s own certification supported the view that "management was responding to a developing situation as parents were contacting both her and [Principal and Superintendent] Dr. Reels on a weekend about a recording of [B.S.] and that the recording actually exists." I.R. at 15. The Designee further reasoned that "if the results of the investigation substantiate that [B.S.] was captured on a recording 'cursing out' a child or engaging in similar behavior, then those results will likely strengthen the Board's defense." Id., at 15-16 (emphasis added).

The Designee granted interim relief to allow B.S. virtual access to grievance committee meetings and other labor-management meetings, finding the Association has a substantial likelihood of success on that claim, based upon: undisputed evidence that such meetings have been conducted remotely for years; the Board provided no explanation for barring B.S. from participating in one such meeting on November 15, 2022; and the record presented

no discernable managerial prerogative related to property interests, workplace order or student welfare, let alone any substantial, legitimate business reason for such a decision. I.R. at 18. The Designee granted that relief based upon a "balancing of the equities," as she found the Association did not establish irreparable harm because it did not provide specific facts in support of its claim that B.S. is "the only one in union leadership with the knowledge or background to process grievances." I.R. at 19.

The Association's motion for reconsideration is supported by a letter memorandum. The Board filed no response.

N.J.A.C. 19:14-8.4 provides that motions for reconsideration may be granted only where the moving party has established "extraordinary circumstances." In City of Passaic, P.E.R.C. No. 2004-50, 30 NJPER 67 (¶21 2004), we explained that we will grant reconsideration of a Commission Designee's interim relief decision only in cases of "exceptional importance":

In rare circumstances, a designee might have misunderstood the facts presented or a party's argument. That situation might warrant the designee's granting a motion for reconsideration of his or her own decision. However, only in cases of exceptional importance will we intrude into the regular interim relief process by granting a motion for reconsideration by the full Commission. A designee's interim relief decision should rarely be a springboard for continued interim relief litigation.

[Ibid.]

Motions for reconsideration are not to be used to reiterate facts or arguments that were, or could have been, raised in the submissions to the Commission Designee. See Bergen Cty., P.E.R.C. No. 2019-20, 45 NJPER 208 (¶54 2018), denying recon. I.R. No. 2019-6, 45 NJPER 123 (¶33 2018); and Union Tp., P.E.R.C. No. 2002-55, 28 NJPER 198 (¶33070 2002), denying recon. I.R. No. 2002-7, 28 NJPER 86 (¶3031 2001).

In Crowe v. DeGoia, 90 N.J. 126 (1982), New Jersey's Supreme Court held: (1) "a preliminary injunction should not issue except when necessary to prevent irreparable harm"; (2) "temporary relief should be withheld when the legal right underlying ... [the] claim is unsettled"; (3) "a preliminary injunction should not issue where all material facts are controverted ... [t]hus, to prevail on an application for temporary relief, a [party] must make a preliminary showing of a reasonable probability of ultimate success on the merits"; and (4) "[t]he final test in considering the granting of a preliminary injunction is the relative hardship to the parties in granting or denying relief." Id. at 132-134. See also, Rutgers, the State University of New Jersey, P.E.R.C. No. 2023-23, 49 NJPER 309 (¶73 2022).

More recently, the Court reiterated that interim relief applications "are governed by the familiar standard outlined in Crowe," and that a party seeking such relief must demonstrate:

- (1) relief is needed to prevent irreparable

harm; (2) the applicant's claim rests on settled law and has a reasonable probability of succeeding on the merits; and (3) balancing the relative hardships to the parties reveals that greater harm would occur if a stay is not granted than if it were. The moving party has the burden to prove each of the Crowe factors by clear and convincing evidence. In acting only to preserve the status quo, the court may place less emphasis on a particular Crowe factor if another greatly requires the issuance of the remedy.

[Garden State Equality v. Dow, 216 N.J. 314, 320 (2013) (internal quotes, citations omitted); see also, State v. Robertson, 228 N.J. 138, 149 (2017) (quoting Dow); Rutgers, supra.]

Further, temporary restraints "shall not" issue if there is not a "substantial likelihood of success on the merits." N.J.A.C. 19:14-9.2(f)(2); Rutgers, supra, citing, County of Burlington, P.E.R.C. No. 2010-33, 35 NJPER 428 (¶139 2009).

As we recently discussed in Rutgers, supra, in County of Burlington, P.E.R.C. No. 2010-33, 35 NJPER 428 (¶139 2009), we explained, consistent with N.J.A.C. 19:14-9.2:

Although the lead New Jersey court case on injunctive relief, Crowe v. De Gioia, does not use 'substantial likelihood,' the courts have recognized that the Crowe standard is similar to that standard. Ispahani v. Allied Domecq Retailing United States, 320 N.J. Super. 494 (App. Div. 1999) (federal court requirement of showing a substantial likelihood of success on the merits is similar to Crowe). In addition, 'substantial likelihood' is the standard we have consistently used in considering interim relief applications.

In support of reconsideration, the Association argues the

Designee committed reversible error in finding the Association did not have a reasonable likelihood of success challenging the Board's prohibition against B.S. entering school grounds. In its letter memorandum, the Association states that B.S. has been under investigation since October 2022 for allegedly cursing in the presence of three fellow teachers in a classroom devoid of students, which was surreptitiously recorded by a cellphone left hidden by a student. The Association contends this does not implicate student safety concerns, as no students were involved or even in the room at the time of the alleged event.<sup>1/</sup> As such, the Association argues, the facts and law do not support the Board's argument, credited by the Designee in denying interim relief, that keeping B.S. off school premises ensured the safeguarding of minors. The Board has the burden to support such a claim, the Association argues, but it offered no supporting evidence other than to simply claim there was a safety issue.

The Association further argues that the Board did not dispute or provide evidence contradicting B.S.'s certification that no other members of the Association's grievance committee have the requisite background and experience to continue in B.S.'s absence, and that grievances have been stalled without her

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<sup>1/</sup> We note that the Association's motion for reconsideration is not supported by a certification of these factual details, nor are they found in the record before the Designee during the interim relief proceeding, as further discussed infra.



attendance. Because those assertions were undisputed, the Association argues it is unclear why the Designee based her decision, in part, on the fact that the Association did not provide further specifics about it.

We decline to reconsider the Designee's decision to deny interim relief regarding B.S.'s access to school premises, as material facts are in dispute about that issue. B.S. certified to the Designee that on October 21, 2023, prior to her suspension on paid administrative leave, fellow teachers told her that a student spoke to other teachers, alleging B.S. cursed at students and claiming a video existed of her doing so in front of a classroom of students. (B.S. Cert., ¶ 3.) B.S. certified that such a video did not exist because the event never happened. (Id., ¶¶ 3.) B.S. further certified that on October 23, 2022, a Sunday afternoon, she received messages about an "emergency" from two parents of students who "were having their own personal difficulties," and that one parent sent her a video recording. (B.S. Cert., ¶4.) B.S. certified that she listened to and heard that recording, and that she discussed it with Dr. Reels (who told B.S. the video was "really, really bad"), but her certification provided no details about its contents. (Id.) B.S. further certified that she was not told by the Board what the allegation against her is. (Id., ¶ 11.)

Thus, based on her certification alone, B.S. admits that

over a three-day period in October 2022: (1) she became aware of allegations circulating from a student to other staff about a video of B.S. cursing out students in front of other students; and (2) she subsequently received and heard a video recording sent to her by a student's parent relating to an unspecified emergency that she discussed with Dr. Reels. While it is unclear from the record before the Designee whether the two events are the same or related, and B.S. disputes that any video of her cursing out students exists or that such an event occurred, there can be no dispute that allegations of such conduct by a teaching staff member implicate student safety and wellbeing, and would warrant an investigation by the Board. Moreover, in its brief opposing interim relief, the Board argued among other things that it has an obligation to follow applicable law regarding student safety and wellbeing, and an interest in enforcing its policy against Harassment, Intimidation and Bullying (HIB).

In its brief in support of interim relief before the Designee, the Association did not claim the Board's investigation concerned B.S. cursing in front of other teachers in a classroom devoid of students or that the cursing was recorded by a student's hidden cellphone. Nor did the Association argue to the Designee in its brief that these facts did not involve students or implicate student safety. Regardless, even if such facts and argument had been presented to the Designee, we find that the

resolution of factual questions pertaining to how and for what purpose a student came to "surreptitiously" hide a cellphone in order to record B.S. and other faculty members would be material to determining whether and to what extent, if any, the incident involved students or implicated their safety. Accordingly, we are satisfied that the Association did not establish a substantial likelihood of success on the merits of its challenge to the Board's decision to bar B.S. from school premises pending the outcome of its investigation.

We grant reconsideration of the Designee's decision regarding remote access, but only to the extent she found the Association failed to establish irreparable harm on that issue. As discussed supra, under Crowe "a preliminary injunction should not issue except when necessary to prevent irreparable harm," and "[t]he moving party has the burden to prove each of the Crowe factors by clear and convincing evidence." Garden State Equality v. Dow, supra. Here, the Designee granted interim relief despite finding a failure to establish irreparable harm. However, we do not alter the Designee's grant of interim relief, because we are satisfied the record supports that the Association established irreparable harm.

In the record before the Designee, the Board did not dispute or offer any evidence controverting B.S.'s assertions that she is the only one on the grievance committee with the requisite

background and experience to process grievances, and that grievances have been stalled without her attendance. Thus, as no material facts are controverted on this issue, the Designee erred in concluding the Association had a burden to produce more specific details to further support that claim. Nor did the Board dispute that on at least one occasion since B.S. was placed on administrative leave, specifically on November 15, 2022, Dr. Reels, without explanation or any legitimate business reason, barred B.S. from participating in a virtual meeting to resolve an issue involving another unit member. I.R. at 7, 18.

Accordingly, we modify the Designee's decision to find that the Association satisfied all the Crowe factors on the remote access claim. We do not modify the interim relief order issued by the Designee on that issue, as such relief is consonant with our decision today.

#### ORDER

The motion for reconsideration of the Teachers Association of Prospect Park is denied, in part, and granted, in part, consistent with the foregoing. We transfer this case to the Director of Unfair Practices for further processing.

BY ORDER OF THE COMMISSION

P.E.R.C. NO. 2023-50

12.

Chair Weisblatt, Commissioners Bonanni, Papero, and Voos voted in favor of this decision. None opposed. Commissioner Ford recused himself.

ISSUED: May 25, 2023

Trenton, New Jersey